No. 12261

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Compania Engraw Commercial E Industrial, S. A., a corporation,

Appellant,

vs.

Schenley Distillers Corporation, a corporation,

Appellee.

BRIEF FOR APPELLANT.

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FOR THE NINTH CIRCUIT

COMPANIA ENGRAW COMMERCIAL E INDUSTRIAL, S. A., a corporation,

Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION, a corporation,

Appellee.

BRIEF FOR APPELLANT.

Compania Engraw Commercial E Industrial, S. A. (hereinafter referred to as appellant), sued Schenley Distillers Corporation (hereinafter referred to as appellee), by reason of its repudiation of its contract with appellant to purchase 1135 tons of glucose at Buenos Aires, Argentina. Under the terms of the contract counted upon, the appellee agreed to pay appellant 1,560,625 Argentine pesos, the equivalent of which in American dollars at the contract rate of exchange is $464,702.06. Both parties have appealed. Judgment for the appellant declared the validity and terms of sale and awarded judgment for damages for the breach. The trial court determined adversely to appellant, that the damages were to be deter-

mined as of the date of the notice of intention to repudiate, rather than at the respective dates when the glucose ought to have been accepted, or in the alternative, at the date of final disposition of the glucose. It also chose as the rate of exchange that prevailing at the date of judgment, and did not accept the contract rate agreed upon by the parties. The damages, in case the contract rate of exchange at dates of delivery were taken, amount to $211,224.08, or in case the alternative date of actual disposition, $238,225.97.

Jurisdiction.

Jurisdiction was conferred upon the District Court by Section 24 of the Judicial Code, as amended, 28 U. S. C. 1332 (formerly Section 41; 1-c and 1391(c) of the Judicial Code). The action is one to recover more than $3,000.00. It was brought by a corporate citizen of a foreign state against a corporate citizen of Delaware, domesticated in California, and actually doing business within the Southern District of California, all as set forth in the amended complaint [R. 19]. This Court has jurisdiction to review the judgment below under Sections 1332 and 1291 and 1294 U. S. C. The judgment was entered February 23, 1949 [R. 70]. Motions under Rule 52-b and 59-e to amend the findings and judgment were filed in due time and were denied March 14, 1949 [R. 78]. The appeal notice was filed April 11, 1949 [R. 79], together with the statutory bond.

Statement of the Case.

There is but slight conflict between the parties on the facts. It is in the application of the law of sales and of contract to the settled facts that differences arise between the appellant and appellee and between each and the Court.

The contract of purchase comprised four letters [R. 112, 115, 121 and 123; Exs. 2 to 5] and were subscribed by the agents, later described, of each of the parties. They were mailed as of the date they bore date, except as to that dated May 23rd, to which the vital addition was made on May 24th after a telephone call between Messrs. Donnelly, Baglin and Whipple [R. 119, 681].

A full written memorandum of the contract subscribed by the agent of appellee, which was particularly noted by the Court, was on May 24, 1946, sent to the Vice President in charge of Production of appellee [R. 684, 692, 374; Ex. 58].

The terms of the contract, amplified by the oral testimony and set forth in the written exhibits and virtually summarized in Finding 4 [R. 63] were that:

> "That it is true that between the 19th day of May, 1946, and the 25th day of May, 1946, a contract was made and entered into between the plaintiff and defendant under and by the terms whereof plaintiff agreed to sell and deliver to defendant, and defendant agreed to purchase and receive from plaintiff 1135 tons of glucose made from pure crystal corn syrup, testing between 43 and 45 degrees Baumé f.o.b. ship in the Harbor of Buenos Aires, Argentina, at the price of 1.375 Argentine pesos per kilo, packed in wooden cooperage and containing 600 pounds each, on a shipping schedule of 50 tons to be shipped in June, 60 tons to be shipped in July, 200 tons to

be shipped in August, 150 tons to be shipped in September, 275 tons to be shipped in October, 200 tons to be shipped in November, and 200 tons to be shipped in December, all in the year 1946; that under the terms of said contract, plaintiff undertook to furnish with each shipment a certificate of analysis showing the glucose in each shipment to be of prescribed specifications, and likewise undertook to furnish a certificate of inspection of cooperage; that under and by the terms of said contract, the total purchase price of said glucose was 1,560,625 pesos; that said defendant agreed to make payment for said total purchase price by a letter of credit bearing expiration date of October, 1946, at the exchange rate of 335.82 Argentine pesos to 100 American Dollars."

Appellant corporation is located in Buenos Aires, Argentina [R. 102; Ex. 1], incorporated under the laws of that country and engaged in the business of exporting from and importing to that country for its customers in the United States; its president at all times herein was G. Fred Berger, who resided in Buenos Aires.

The agent of appellant in the present transaction, duly authorized to act, was Harold A. Whipple [R. 105, 196, 199; Ex. 18; R. 202; Ex. 19], an import-export broker with offices in Los Angeles, California. He carried on the negotiations with appellee both by telephone and letter.

Appellee corporation is domesticated in California, although organized under Delaware laws, and transacts business in the Southern District of California, where it has an office, according to the admission of the answer [R. 45].

The agent of appellee in the present transaction, duly authorized to act, was J. B. Donnelly [R. 126, 693; Ex. 6], who apparently had no official title. He and his assistant, R. H. Baglin, carried on the negotiations with appellant. Their offices were in San Francisco.

The negotiations for the purchase of glucose were started by Mr. Donnelly about May 14, 1946 [R. 106], in a telephone call to Mr. Whipple. Other telephone calls, with consequent cables from Mr. Whipple to his principal in Buenos Aires, resulted in what might be termed a letter of intent or offer on May 20, 1946, from appellee [R. 112; Ex. 2]. They culminated in the acceptance dated May 23, 1946 [R. 123; Ex. 5].

A notice of intention to repudiate the contract was given by telephone on June 6, 1946 [R. 143], by an unidentified person to Mr. Whipple; then on June 7, 1946, by wire [R. 144, 398; Ex. 13], which merely conveyed the statement that appellee would not contract. The individual who made the telephone conversation and signed the wire, a Mr. Jas. E. Woolsey, was not known to Mr. Whipple, nor was his authority in any way determined. No information came from either Messrs. Donnelly or Baglin.

Active negotiations for the determination of liquidation of liability of appellee were started by a cablegram from C. W. Metcalf to appellant on June 11, 1946 [R. 281, 283; Ex. 29], and likewise a telephone call from Mr. Metcalf to Mr. Whipple on said date [R. 332; Ex. 48]. Mr. Metcalf was a consultant in the employ of appellee [R. 281] and was directed by Mr. Carl J. Kiefer [R. 842; Ex. R 3] to "continue to handle this matter." Mr. Kiefer was the vice president of appellee in charge of production

[R. 785; Ex. R 2], and Mr. E. R. Dichter, who subsequently conducted the Argentine negotiations, was an employee of appellant who acted under the express direction of Mr. Metcalf [R. 327; Ex. 42]. Mr. Dichter, under instructions, went to Buenos Aires to investigate the facts and he and Messrs. Berger and Metcalf made a tentative agreement that appellee would furnish a twenty per cent letter of credit, and an orderly liquidation over the contract period, under the control of Messrs. Berger, Dichter and a Dr. Goytia, would be made [R. 288, 293, 296; Exs. 31, 32]. It was not until September 4, 1946 [R. 314], that appellant was advised by the secretary of the appellee, Mr. Heymsfeld of New York, that appellee "had no further intention of going through with any arrangement." On September 20, 1946, appellee finally, by letter from its secretary, confirmed its intention to repudiate the contract [R. 318; Ex. 37].

An open public market established the market values during the whole contract period to the date of disposition. The evidence as to market values was produced by deposition from four dealers and two brokers in Buenos Aires, all of whom were active in the glucose market [R. 458, 461, 490, *et seq.;* Exs. 60A to G]. Speculative buyers had built the price from 78 centavos per kilogram in January, 1946, to 1.20 pesos in June [R. 557; Ex. 60G]. The price firmed at 1.20 in June [R. 495; Ex. 60A], but with news of the repudiation becoming public, there was a sharp and complete break [R. 495, 516, 527, 536; Exs. 60A-C-D-E], and the price fell to 60 centavos per kilogram during the latter part of June and continued at that rate during the whole contract delivery period [R. 516; Ex. 60C]. It then fell to 52 or 53 centavos [R. 505, 516, 537; Exs. 60B-C-E] per kilogram during

April of 1947, the date of final disposition. The market price in Buenos Aires was based upon glucose in bulk or returnable containers, and was a price irrespective of foreign or domestic consumption [R. 495, 506, 537; Exs. 60A-B-E]. Transference of the glucose to f.o.b. ship status was constant throughout the period at 15 centavos per kilogram, which paid the expense of cooperage into wooden kegs, transportation to ship's side, and the placement on ship, including clearance of export taxes and incidentals [R. 537; Ex. 60E].

Canvass of the Buenos Aires and world market after repudiation brought no purchasers. Dealers on the Buenos Aires market testified [R. 495, 505, 526-537; Exs. 60A-B-D-E] that the very news of the repudiation of the present contract, comprising as it did an immense quantity of glucose, disorganized the market, and sales on that market were thereby rendered fruitless [R. 537; Ex. 60E]. Appellant, by cable and letter and at great expense, sought buyers throughout Europe and Asia, but without avail [R. 334]. Europe was flooded by UNNRA shipments [R. 527; Ex. 60D], and competition from the United States was offering at prices below the Argentine market [R. 556; Ex. 60G]. Significant it is that the suppliers of appellant, although they had their remedy by legal vendue, did not throw their holdings upon the market.

Appellant entered into contracts with five glucose suppliers to furnish deliveries in accordance with the deliveries under the contract with appellee [R. 228, 243; Exs. 21A to G]. These contracts were all made between May 22 and May 24, 1946, and were all at a price of 1.20 f.a.s. The difference between the market price and the f.a.s. price was a constant of 10 centavos [R. 551;

Ex. 60G], just as the difference between the f.o.b. cost and the f.a.s. cost was 5 centavos [R. 551, 537; Ex. 9E].

Litigation with the suppliers ensued after the breach, involving necessarily court expense and time lost. Eventually a compromise was reached under which the suppliers terminated their claims against appellee [R. 341, 342; Ex. 50], on April 9, 1947, and on that date final disposition of the glucose contracted with appellee was made. Until that date, no disposition could be made of the glucose by sale or otherwise. Therefore, appellant claims the right of recovery, taking the April, 1947, market value.

Findings and Conclusions of Judgment.

The District Court has filed its written opinion [R. 58], upon which the findings were based.

It found the facts as in favor of appellant as to:

(a) The contract.

(b) The period of negotiations.

(c) The public market or current price during the whole contract period.

(d) The clear and certain proof of the market price.

(e) The performance of all conditions by appellant.

(f) The contract was one in foreign commerce.

(g) No prohibition of the export of glucose from Argentina was extant.

(h) The repudiation by appellee of its contract.

It determined adversely to appellant the facts as to:

(a) The two market prices, one for domestic consumption and one for export.

(b) These market prices had no constant relation to each other.

(c) The market price in September.

(d) The lack of inducement to defer any disposition during the liquidation negotiations.

It omitted to find the essential facts as to:

(a) Market prices at the seven contract delivery dates.

(b) The market price on the date of final disposition.

It made clerical errors as to:

(a) Various computations.

It erred in holding:

(a) That the date of the first notice of intention to repudiate the contract was the date for determination of damage.

(b) That the notice of intention to repudiate was in fact an anticipatory breach.

(c) That the rate of exchange computing the damages was $.206, which was the rate on February 2, 1949, rather than the contract rate of $.33582.

(d) In refusing to hold either that the seven delivery dates specified in the contract or the date of final disposition of the glucose were the dates for the determination of the damages.

Questions Presented.

First: Where the buyer of goods without cause denies the existence of contractual relations and refuses to accept and pay therefor, there being at all times an available market for the goods in question, is the measure of damage for the breach of contract the difference between the contract price and the market or current price at the time of the first notice of intent to repudiate, or is the seller entitled to measure its damages by the difference between the contract price and the market or current price at the respective times when the goods ought to have been accepted in accordance with the contractual terms?

Second: Where a buyer of goods, without cause, has given to the seller notice of its intention to repudiate the contract of purchase and negotiations thereafter ensue between the parties concerning an orderly liquidation of the goods and settlement of the contractual liabilities, do such negotiations, even though unconsummated, operate to defer until the conclusion thereof the date for the assessment of damages for breach of the contractual obligation to accept and pay for those goods which by the contractual terms became deliverable during the course of the negotiations?

Third: When the parties by contract have agreed upon a certain rate of exchange at which foreign moneys shall be transmuted into domestic moneys and *vice versa,* is this binding upon the parties and the Court?

Fourth: Where the parties to a contract have not agreed upon the rate of exchange at which foreign moneys shall be transmuted into domestic moneys and suit is brought for breach of contract to pay in foreign moneys,

is the judgment to be entered for the dollar value of the foreign moneys as of the contractual date at which payment should have been made or as of the date of the judgment?

These are the questions raised by appellant's amended complaint as amended, and the answers to which are involved in this appeal.

Specification of Errors.

The District Court erred in the following particulars:

1. In holding that the damages for repudiation on anticipatory breach of the contract for delivery of goods at the seven different delivery dates specified in the contract be fixed as of the date of notice of intent to repudiate rather than at the dates when the merchandise ought to have been accepted. This holding is implicit in Findings 6 and 8 [R. 65 and 67], Conclusion 3 [R. 68] and Decision Paragraph 2 [R. 59].

2. In holding that a mere notice of intent to repudiate, without any action thereon by the promisee, actually constitutes an anticipatory breach of contract. This holding is implicit in Finding 6 [R. 65], Conclusion 3 [R. 68], Decision 2 [R. 59] and the complete absence of any evidence of acceptance or action thereon by the plaintiff.

3. In holding that negotiations between the parties for liquidation of the liability of appellee as they were conducted, did not induce appellant to defer action for disposal of the glucose. This holding in Finding 7 [R. 65], Decision 2 [R. 59] is contrary to the evidence and is wholly unsupported thereby.

4. In holding that the damages for the repudiation on anticipatory breach of the contract for the delivery of

goods at seven different delivery dates, be fixed at the date of the notice of intent to repudiate or make anticipatory breach rather than at the date of final disposition, although the first three delivery dates were extended by reason of negotiations between the parties for settlement of liability and liquidation. This holding is implicit in Findings 4, 6, 7 and 8 [R. 63, 65, 66], Conclusion 3 [R. 69], Decisions 2 and 3 [R. 58 and 60] and is contrary to the sole evidence produced and is unsupported thereby.

5. In holding that although the contract of the parties specifically provides for a definite exchange rate at which foreign currency will be transmuted into domestic money, the rate of exchange prevailing at the date of judgment be used in determining the amount of damage. This holding is implicit in Finding 9 [R. 67], Decision preamble [R. 58]. It is contrary to finding of the contractual term in Finding 4 [R. 64] and is cited as Error in Law.

6. In holding that the rate of exchange specified by the terms of the contract bears no relation to the amount of damage which appellant was entitled to receive. This relates to Finding 6 [R. 64]. The Court found in said finding the contract rate of exchange was 335.82 Argentine pesos to 100 American dollars, then contrary thereto found that appellant was not entitled to receive payment in accordance with the contract. Contrary further to this finding, it arbitrarily fixed the rate as of February 2, 1949, in Finding 9 [R. 67]. The findings are conflicting in this respect and contrary to the evidence of the contract, and are also cited as error of law.

7. In failing to find that there was but one market and one market price in Buenos Aires for the sale and

purchase of glucose, and that the cost of transference from that market to f.o.b. ship in Buenos Aires was a constant of 15 centavos per kilogram, in accordance with the uncontradicted evidence. Finding 8 [R. 66] is in itself contradictory in that it finds in the first part thereof that at all times there was "an actual open and public market and established market price." Thereafter it proceeds to find that there was a market price for glucose for domestic consumption and a market price for glucose for export, and that these prices have no fixed or constant relationship. In so far as the finding is contradictory, it is cited as Error of Law. The finding implies that there were two markets and two market prices. Therein it is contrary to the evidence and is wholly unsupported thereby. The finding that there was a difference between the market price for domestic consumption and that for export is contrary to the evidence and is wholly unsupported thereby. The implied finding that there was no continuing fixed or constant relationship to the domestic market price for glucose and the export cost pertaining thereto is contrary to the evidence and is wholly unsupported thereby. The finding that the established market price for glucose during June, 1946, for export was 1.35 Argentine pesos per kilogram is contrary to and wholly unsupported by the evidence as to any sum above 1.20 Argentine pesos per kilogram. In this respect, it may be stated as true that the evidence established a market price of 1.20 Argentine pesos per kilogram and that the cost of transference f.o.b. ship in Buenos Aires Harbor was 15 Argentine centavos per kilogram.

8. In its holding against the uncontradicted evidence that the market value of the glucose in September, 1946,

was in excess of 60 centavos per kilogram. Finding 8 [R. 66] in its holding as to the September, 1946, export price, is contrary to the sole evidence of market prices. Said evidence showed a market price in September, 1946, not above 60 centavos Argentine per kilogram and that the cost of transference from the market f.o.b. steamship Buenos Aires Harbor was 15 centavos Argentine per kilogram.

9. In failing to find the market price for glucose in the Buenos Aires market at the respective seven delivery dates specified in the contract and at the date of the ultimate disposition thereof. The essential issue was tendered in the Amended Complaint, Paragraph X of the First Cause, and Paragraph III of the Second Cause [R. 22 and 24] of the market values during the contract delivery period and until final disposition. The evidence is clear as to these market prices. It was error not to find thereon.

10. In permitting clerical errors in the findings of judgment. Finding 8 contains an obvious clerical error; 1,560,625 — 1,532,215 = 28,410 not 28,375. This carried forward in Finding 9 which requires the amount of $5,852.44 instead of $5,845.25 and into Finding 10 which requires the figure of $1,111.71 instead of $1,103.35, with consequent error in the judgment which should be $6,964.17 instead of $6,946.60.

11. In failing to grant the motion of appellant to amend the findings and judgment under the provision of Federal Rules of Civil Procedfure 52-b and 59-e, in accordance with the uncontradicted evidence. These motions embraced the same specifications as are hereinabove stated. The action of the Court in denying each of the two motions is cited as Error.

ARGUMENT.

I.

Repudiation, Renunciation or Anticipatory Breach Made by Appellee Entitled Appellant to Recover Its Damages Therefor in an Amount Equivalent to the Total Difference Between the Contract Price and the Market Prices Prevailing at Each of the Dates When Appellee Ought to Have Accepted and Paid for the Glucose.

The problem of the case at bar is to apply the general rule governing sales contracts to an indivisible contract with several delivery dates on which notice of intent to repudiate was given prior to the time for deliveries thereunder. Incident to the solution is the determination of the actual date of repudiation and the effect, if any, of unconsummated negotiations instituted by the vendee for the liquidation of its liability. Under the facts of this particular case, inasmuch as the negotiations and the determination of the date of repudiation involve much the same evidence, in the interests of brevity, they will be treated in connection with each other. Upon the solution of these problems, it will be clear that appellant is entitled under the law and the evidence, to the full damages for which it prays.

The amended complaint allages [R. 21] that on June 7, 1946, appellant was informed that it should "proceed no further with said contract or deliveries thereunder," and in Paragraph VIII of the pleading [R. 22] it is averred that on September 18, 1946, appellee "definitely refused to accept any deliveries." These averments were placed in issue by the answer of appellee [R. 47]. So the problems, as above stated, were issuable under the pleadings and ample evidence for their determination is in the record.

A. The General Rule for Determination of Damages for Sales.

Under the Uniform Negotiable Instruments Law, as adopted in California, the particular section governing this case is found in Section 1784, subdivision 3 of the California Civil Code, reading:

> "Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

There was an available market in Buenos Aires at which glucose could be purchased at all times during the contract period [R. 494-505-526-536], and there were established market and current prices therefor; in fact, Finding 10 [R. 67] so states. The contract provided for seven definite successive dates for the acceptance by appellee of definite quantities of glucose. Appellant contracted with its suppliers for periodic deliveries of glucose so as to enable it to fill each of the requirements for the seven specific delivery dates [R. 228-230-243; Exs. 21A to G]. The quoted Code section specifically provides that the damages be fixed "at the time or times fixed for acceptance." It is only when no time is fixed by the contract for acceptance that damages may be determined "at the time of refusal to accept." Thus, the only provision of the Code applicable to the case at bar is that fixing the damage at the times fixed by the contract for acceptance.

Subsequent to the adoption of the Uniform Sales Act in California, the California Supreme Court clearly and definitely determined the rule in two outstanding decisions in one case governing the determination of damages involving only one contractual delivery date. A vendor plaintiff contracted with a vendee defendant to sell flour. The vendor contracted with third parties to furnish the flour in order to supply the contract thus made. The vendee, after several deliveries had been made, refused to accept final delivery. Anticipatory breach was not involved. The action was for damages for this failure to accept. The trial court had allowed the recovery of the difference between the contract price to the vendee and the contract price to the vendor made by his suppliers. The market had fallen. Objection was likewise raised that the vendor, in claiming the difference between the contract price and the market price at the time of specified delivery, would make a profit. In the first of these cases, the Court held, *Rice v. Schmid,* 18 Cal. 2d 382, 115 P. 2d 498:

> "He was obligated to deliver the flour in any event. His duty was not conditioned upon the performance of any contract he should chance to make with the miller. Therefore, his damages should not be affected by his loss upon any such contract. Since he was free to wait and procure flour at the market price when ordered by the buyer, he is entitled to recover as damages the profits which he would have made in that event, the difference between market price and the contract price * * *. The possibility that the plaintiff may make a large profit is a result of the decline in the market price and is not a sufficient reason for allowing the defendants to escape the obligations of their contract. (For a full description

> of the principles here involved, see *U. S. v. Burton Coal Co.,* 273 U. S. 337; 47 Sup. Ct. 351; 71 L. ed. 670; 27 Colum. Rev. 877.)"

This case again came before the California Supreme Court, as the trial court refused to deal with any flour other than that actually purchased and on hand. In the second appeal, the Supreme Court held that it was wholly immaterial as to the flour on hand at any time. In fact, the vendor need not have any on hand prior to the date when he must deliver. But this fact did not furnish any basis for finding that the plaintiff's recovery be affected, and stated (*Rice v. Schmid,* 25 Cal. 2d 259-62, 153 P. 2d 313):

> "It was held on a prior appeal that under the terms of the contract, defendant's obligation to accept the flour continued until the termination of the contract, and that the damages should be the difference between the contract price and the market price on the date of the final termination of the contract."

One feature, at first blush, seems to differentiate the *Rice v. Schmid* case from the case at bar. This difference, on analysis, is however, only apparent rather than real. In the case at bar there were contractual "times when the goods ought to have been accepted." In the *Rice v. Schmid* case there was only one time for acceptance and that was on or before the date fixed in accordance with the contractual terms by the seller. The *Rice v. Schmid* case contract provided for deliveries on buyer's instructions and that in case of failure to receive such the seller could give notice to terminate. The seller gave the notice

and fixed December 2, 1938, as the date for termination. The buyer stood obdurate. The Supreme Court, contrary to the trial court, held the termination date so fixed was the date for measurement of damages between the contract and market price. That date was in fact the "time when the goods ought to have been accepted"; it was, if no time had theretofore been fixed, "the time of the refusal to accept" and was "the final termination of the contract."

The California Court referred to and relied upon the rule announced by the United States Supreme Court in the Burton case. In this case, the Burton Coal Company had a contract with the Government for the delivery of coal over a period of time for use at army posts in the Chicago district. In order to furnish this coal, the Burton Coal Company had made various contracts for the purchase of coal from mining companies under which deliveries were to be made at different periods. It had no coal of its own, except as it acquired coal under these purchase contracts. After some of the coal had been delivered, the Government refused to accept the balance. The Court of Claims gave judgment for the *difference between the contract price and the market price at the times and places specified for delivery.* The Government appealed and claimed that the rule of damage should be the difference between the contract price to the Burton Coal Company and the contract price to the Government. The Court held in *U. S. v. Burton Coal Company,* 273 U. S. 337, 47 Sup. Ct. 351, 71 L. Ed. 670:

> "Appellee was bound to deliver the quantity of coal covered by the contract. Failure of the sources referred to in the contract would not excuse it. In contemplation of law, *it could have obtained the coal*

at market prices prevailing at the times when deliveries were required under the contract. The contract was not for production or mining, but for sale and delivery of coal. Appellant and appellee were the only parties to it. There was no contract between appellant and any of the mining companies. Their default would not make them liable to appellee, or would relieve appellee from the obligation to deliver the coal to appellant. Appellant's liability is not measured by appellee's loss or gains, if any, under its agreements with the mining companies. Appellee is not entitled to have the full contract price of coal not delivered, but is chargeable only with its market price. The difference between that value and the contract price is the amount of damage deemed by the law directly and naturally to result in the ordinary course of events under appellant's breach of contract. The cost of appellee of securing the coal and the amount of its profits are immaterial. *Garfield & P. Coal Co. v. New York N H & H R Co.,* 248 Mass. 502-506; 143 N. E. 312; *Kadish v. Young,* 108 Ill. 170-178-186; 43 An. Rep. 548; *C. F. Jamal v. Moolla Dawdood Sons Co.* (1916) 1 A. C. 175 P. C. The judgment leaves appellant in as good position as it if had accepted and paid for the coal in accordance with the contract." (Italics added.)

The rule, therefore, is clear that the damages must be the difference between the contract price and the market price at the times and places specified for delivery. It is further clear that it matters not, by reason of the fact that there was a decline of the market, that a judgment for damages between that which the vendor contracted to purchase and that which it contracted to sell, may be recovered.

B. The Rule Is Clear That an Anticipatory Breach or Repudiation of an Executory Sales Contract Gives an Option Exclusive to the Promisee to Treat the Contract as Binding During the Full Time for Performance, or to Take Immediate Action Either by Rescission or Suit.

Consideration of the situation of appellant on receipt of the notice of intention to repudiate is first required. Seven contracts with five different suppliers were made under which the respective suppliers were bound to deliver, and appellant was bound to receive, the 1135 tons of glucose contracted by appellee at seven successive monthly delivery dates, extending from June to December, 1946. The market was known to be highly speculative, and the new Peron Government was just assuming control.

News of the notice from Mr. Woolsey was received by night letter from Mr. Whipple of date June 6th [R. 145; Ex. 14; R. 145]. This could not have been received until the 7th, as the telephone conversation with Mr. Woolsey was about 2 o'clock of the afternoon of the 6th [R. 398; Ex. 52]. June 7, 1946, was a Friday. On June 8th Mr. Berger sent his cable directly to appellee at its Cincinnati office [R. 279-280; Ex. 28], but the cable actually was not delivered until Monday, the 10th, as the exhibit shows. On June 11th, Mr. Metcalf commenced negotiations by his cable to appellant [R. 283; Ex. 29], and by telephone to Mr. Whipple [R. 330; Ex. 47], all contemplating liquidation of liability.

Appellant did not have on hand in June, nor was it required to have on hand the 1135 tons of glucose. There-

fore, it was physically impossible for it to throw that quantity upon the market for sale in June. This quantity of glucose represented approximately one-seventh of the whole actual glucose export from Argentina [R. 494-504-536; Exs. 60A-B-E]. In case this glucose had been thrown upon the market on that date, unquestionably it would have broken the market so that sales could not have been made except at practically give-away prices [R. 495-506-516-526-537; Exs. 60, 60A-B-C-D-E]. Under the rule of *Rice v. Schmid* and *Burton v. United States, supra,* the seller need only deliver and possess the ability to deliver when under the contract delivery was required.

The circumstances of this transaction therefore left no alternative but to stand upon the contract, treat it as binding during its full term, and take action for the determination of damages at its final termination. Expense incident to separate actions at the end of each month rendered such method prohibitive. Appellee was not present in Argentina. Businessmen desire to avoid the expense and delay of litigation. It was the duty and it was desirable for appellant to liquidate its damage when opportunity so to do this was offered by appellee, in such manner as to preserve the rights of appellee. Therefore, the determination to stand upon the contract, arrange for liquidation, if possible, under the offers of appellee, endeavor to dispose of the glucose pending final action, and in the event of the failure of either of those methods, to bring suit upon the termination of the contract, was justified both under the facts and the law.

The rule which gives to the innocent promises his exclusive election to take action immediately upon the breach or wait the termination of the full contract, is clear, rea-

sonable and factually workable. It is in true consonance with such elementary legal principles as set forth in

California Civil Code, Section 98:

"A contract in writing may be altered by a contract in writing or by an executed agreement and not otherwise."

The definite rule throughout the United States specifically followed in the California and the Federal jurisdictions is plainly stated in

17 *Corpus Juris Secundum,* Section 472, page 973:

"On repudiation of an executory contract, the promisee may (1) rescind the contract, or (2) treat the contract as binding until the time for performance, or (3) sue immediately for the anticipatory breach."

Restatement of Contracts, Section 338:

"The rule for determining the damages recoverable for an anticipatory breach are the same as in the case of a breach at the time fixed for performance.

COMMENTS: The fact that an anticipatory repudiation is a breach of contract does not cause the repudiated promise to be treated as if it were a promise to render performance at the date of the repudiation. Repudiation does not accelerate the time fixed for performance, nor does it change the damages to be awarded as the equivalent of a promised performance."

This is the definite rule in California:

Alderson v. Houston, 154 Cal. 1-10, 96 Pac. 884.

"(1) He may treat the contract as rescinded and sue at once on a *quantum meruit* for the service actu-

ally rendered by him prior to the revocation of notice thereof, or (2) he may treat the contract of employment as continuing, though broken by the principal, and sue on the breach for damages. In the latter case, he may either sue for damages at once upon the breach of the contract or wait until the expiration of the time of service fixed by the contract and then sue for damages."

Walker v. Price, 163 Cal. 617-620, 126 Pac. 482;

Ross v. Tabor, 1 Cal. App. 2d 533-43, 36 P. 2d 821;

Robinson v. Raquet, 1 Cal. App. 2d 533-43, 36 P. 2d 821.

This is the rule in the Federal courts. It is to be noted that in the *Burton Coal Company* case above cited, the Court of Claims judgment was for the difference between the contract price and the market price at the times and places specified for delivery. This rule was upheld in the Supreme Court decision. The ruling was required by a former decision of the Supreme Court, which gave very thorough consideration to the facts and is a leading case on the point:

Roehm v. Horst, 178 U. S. 1-11, 20 Sup. Ct. 78, 44 L. Ed. 953-7.

The particular point here involved was emphasized in a succeeding case similar on the facts to that of the case at bar.

Kunlig, J., v. Dexter & Carpenter, 32 F. 2d 195-8:

"The measure of damages is the difference between the market and the contract price at the time when and the place where delivery was due (*U. S. v. Bur-*

> *ton Coal Co.*, 273 U. S. 337.) Dexter & Carpenter introduced evidence to establish the market value of the coal at the tidewater ports during September and October, 1920, the freight then prevailing for shipment of coal to the designated Swedish port and cost of insurance on such shipments. The total of these three items deducted from the contract price would give the seller's damage. There was also testimony that the supply of coal on ships and of insurance was sufficient to have enabled Dexter & Carpenter to have shipped during the period in question 60,000 tons of coal of the contract quality. In respect of the measure of damages, there was no error."

Thereby the seller is entitled to bring his action on the date of each delivery date, but he is not required to cumber the record with these seven different actions. He is fully entitled to await the full contract term and then, as appellant did in this case, file its action for all of the seven breaches. The courts throughout the country dealing with this type of case have found the rule clear that the damages are to be determined as of the last date for shipment of each of the several shipments.

Muehlstein & Co. v. Hickman, 26 F. 2d 40:

> "The seller is not compelled to avail himself of an anticipatory breach, but may wait until the full period of performance has expired. The rule is thus clearly stated by Judge, now Chief Justice Taft, in *Bevard & Tannin Co. v. J. F. Mosser Co.*, C. C. A. 4th, 28 Fed. 729.
>
> 'The provision for delivery by monthly instalments of four tanks before September 26th had been clearly waived by the parties, and the deliveries of the tanks not delivered had been postponed by their acquies-

cence. Defendant has no right to insist that plaintiff's damage should be measured by the market prices in the preceding months, when, with consent of the plaintiff, it delayed deliveries. These principles are truly established by the authorities.' "

Weld v. Victory Mfg. Co. (1913 D. C.), 205 Fed. 770;

Adler v. Kiber, 5 Tex. Civ. App. 415, 27 S. W. 23;

Voght Bros. Mfg. Co. v. Sloss Sheffield Steel & I. Co. (1942 C. C. A. 6), 297 Fed. 54;

J. P. Gentry v. Margolius, 110 Tenn. 669.

C. Repudiation Was Ineffective Prior to September 20, 1946. The June Notice of Intent Was Wholly Unilateral Until That Date and Was Refuted by the Negotiation Instituted by Appellee for Contract Cancellation and Liability Liquidation.

The basic error of the trial court was in its holding that repudiation took place with a consequent termination of contractual rights at a date prior to September 20, 1946. This error appears in the preamble and Paragraphs 2 and 3 of the Decision [R. 58] and in Findings 6 and 8 [R. 65 and 66]. Therefore, the action of the Court in fixing June 6, 1946, as the critical date for determination of damages is wholly untenable. Two settled legal principles, either of which would be sufficient, join in the case at bar to require deferment of the period for fixation of damages until subsequent to September 20, 1946. First, there was no repudiation until the September date, and second, active negotiations instituted by appellee for contract termination or liquidation of its liability were in progress until that date. Against each of these two principles, against the decisions of the California courts supporting

them, and against the facts as uniformly disclosed by the documents, testimony and evidence, the District Court ruled that the damages for the breach of the whole contract be advanced from the respective delivery dates to and determined as of date June 6, 1946. On its opinion the District Court grounded its findings and judgment. The controlling portion of Paragraph 2 reads:

> "When, as here, there is a direct repudiation and denial of the existence of any binding agreement, the other party to the agreement is not justified in continuing to make commitments that might change its decision. This is especially true when, as here, it is admitted that whatever discussions took place after this repudiation, *did not aim at restoring the contract,* but at liquidating the liability of the defendant for payment of money to the plaintiff." (Court's emphasis.)

This statement contains two fallacious premises and a complete non sequitur. First, the evidence is positive that the appellant made no commitments that changed its position. Second, the negotiations were clearly for the purpose of liquidating the contract liability and preserving all of the rights of appellant. Third, even if the two fallacious premises had been true, it does not follow through, either legally or factually, that the determination of damage would relate back to the original notice of intent to repudiate.

The repudiation notice of September 20, 1946, was the only effective repudiation. This fact and the further absence of any commitments on the part of appellant subsequent to May 23, 1946, are considered under this heading. The point that the dates for the determination of damages commence subsequent to September 20, 1946, is considered

in the immediately succeeding division of this brief. For the sake of brevity, as the cited evidence bears on each of the three points, close examination of the oral and documentary evidence is here made. It will be found that from this evidence there was prior to September 20, 1946, no completed contractual relations which in any respect altered the position of the parties.

1. Examination of Evidence on Notice of Repudiation and of Negotiations.

The repudiation notice mentioned in Finding 6 [R. 65] and the Decision [R. 59] was a telephone message from a Mr. Woolsey to Mr. Whipple [R. 143-443; Ex. 59A] on June 6, 1946. Mr. Woolsey also sent a wire on June 7th [R. 144; Ex. 13]. These acts were pursuant to a telephone call from Mr. Heymsfeld to Mr. Woolsey on June 5th [R. 568, R. 824; Exs. R and R 3]. It is to be especially noted that neither Mr. Heymsfeld nor Mr. Woolsey, although nominally Secretary or Assistant Secretary of appellee, were in any respect executive officers [R. 429-30; Ex. 59A]. Then on June 6th at noon, two hours before he had telephoned to Mr. Whipple [R. 398; Ex. 52], Mr. Woolsey wired Manny Blanc [R. 402; Ex. 53] to take no action on the samples of glucose being forwarded to Mr. Whipple. It will be noted that Mr. Whipple, on June 5th, in accordance with the talks with Mr. Baglin, had sent a sample of glucose to Manny Blanc [R. 139; Ex. 11]. The mainspring of this action on the part of appellee is found in the memorandum of instructions of Mr. Metcalf, the consultant of appellee, of date June 24th [R. 324; Ex. 40], wherein he stated that in May appellee thought it would require a very large quantity of glucose, and negotiations for the purchase of 1135

tons ensued, but in June it developed that appellee did not need this material and asked for cancellation. Suffice it to say that the duplicity of the appellee is manifested in this respect as it is throughout the negotiations.

The negotiations concerning the liquidation of the contract liability of appellee were active and continuous for two months. They are evidenced by writings signed by the respective parties through duly authorized agents. During June, appellee's plan was cancellation of the contract and payment of damage; in July, it turned to orderly liquidation over the contract period. They commenced with the two cables sent by appellant to appellee [R. 272, 274-279; Exs. 27 and 28], the first on June 5th and the second on June 8th. The first wire caused Mr. Carl J. Kiefer, the vice president in charge of production of appellee, to direct Mr. Metcalf to "handle this matter and advise what action is to be taken" [R. 842; Ex. R 3]. The second cable was likewise referred to Mr. Metcalf, and he quotes therefrom in a memorandum of a telephone conversation which he held with the agent of appellant, Mr. Whipple of Los Angeles, on June 11th [R. 332; Ex. 47]. In this talk, he "asked Mr. Whipple to call Engraw on the telephone at our expense to determine what the loss would be in liquidation of both the 50 tons ready for shipment, *as well as the balance of the contract.* * * * I told Mr. Whipple * * * that it was not our intention to cause either him or his principals any out-of-pocket expense."

On the next day, Wednesday, June 12th, Mr. Metcalf, emphasizing the telephone talk with Mr. Whipple, cabled appellant [R. 283; Ex. 29] and requested direct advice as to the "extent of your uncancellable commitments." In answer, appellant cabled Mr. Whipple [R. 235; Ex. 30]

the commitments and damages for liquidation. In mid-June, these were relayed to Mr. Metcalf in several telephone conversations with Messrs. Whipple & Stanton, counsel for appellant [R. 635; Ex. S]. Appellee had internal inter-office communication. About June 24th, determination was made to send Mr. Dichter, a trusted agent, to ascertain the facts. In instruction to Mr. Dichter [R. 325; Ex. 40] it was stated:

> "Engraw appears willing to cancel, but is asking 2¢ per pound to cover loss."

Mr. Dichter, on June 30th, arrived at Buenos Aires [R. 856; Ex. R 3]. Apparently, he immediately telephoned to Mr. Metcalf [R. 330; Ex. 46]. Something must have occurred in this telephone talk upon which Mr. Metcalf desired consultation with the officials of appellee. Mr. Metcalf, it is to be observed, was acting, at all times, upon instructions of his superiors. After the talk with Mr. Dichter, he reported to Mr. Heymsfeld, on Wednesday, the 3rd of July, and stated that he would discuss the glucose situation with him on Monday, which was the 8th of July [R. 332; Ex. 39]. Between arrival and July 4th, Mr. Dichter made a thorough investigation of market conditions and of appellant's commitments [R. 291]. On July 4th, he called upon the president of appellant [R. 287] and stated that he had been sent by appellee, had authenticated the market situation and the status of the commitments made by appellant [R. 287]. After this careful examination on the ground, Mr. Dichter then suggested that a program be devised so that the *glucose commitments be either liquidated or cancelled.* The two men then [R. 291] "made visits to several of the suppliers and particularly to the large one S.I.F.A.R., in order to ascer-

tain just exactly what arrangements could be made, either in regard to cancellation, if cancellation was to be arranged, or liquidation, and after we had had these interviews, then we compiled this cablegram of July 8th and sent it to Schenley Distillers." There resulted a joint cable to Mr. Metcalf on July 8th [R. 288; Ex. 31]. This joint cable is of special importance for our purposes here. This wire states that cancellation of the contracts will cost approximately $45,000.00, but that in case appellee will open a letter of credit and *provide for an orderly liquidation by sale of the glucose over the whole contract period,* under the control of Messrs. Dichter and Berger, the loss can be materially reduced. However, he further states that the commission due to Mr. Whipple must be considered outside of either of these proposals. A telephone conversation between Messrs. Dichter, Berger and Metcalf followed the cable. Therein, Mr. Metcalf

> "stated that insofar as the program outlined in our letter of July 8th was concerned, that it seemed quite satisfactory to him and authorized us to make contact with Dr. Goytia.
>
> Then I told Mr. Metcalf that we would check on the matter of letter of credit requirement and that we would then proceed to Dr. Goyia's office to complete." [R. 294.]

Mr. Metcalf's version of this telephone conversation is found in the memorandum thereof which he made [R. 332; Ex. 48]. In accordance with Mr. Metcalf's request, Mr. Berger cabled him on July 12th [R. 296; Ex. 32] that the necessary letter of credit would be twenty per cent of the purchase contract [R. 296; Ex. 32]. Dr. Goytia estimated the dollar value of this letter of credit

at $85,000.00 [R. 610; Ex. R 1]. Messrs. Berger and Dichter visited the glucose suppliers of appellant and confirmed that arrangements would be made with them for the cancellation of their contracts with appellant [R. 291]. They "agreed that if liquidation was to be arranged they would take the 20 per cent letter of credit" [R. 295]. Pursuant to directions of Mr. Metcalf, Messrs. Dichter and Berger consulted with Dr. Goytia, and he exchanged cables with his correspondent counsel in New York. There are, in the record, only the cables of date July 18th and 22nd from Dr. Goytia, produced from the files of appellee [R. 610-612; Ex. R 1]. These cables outlined the proposal for the liquidation procedure and definitely show that no commitment was, at any time, actually reached on the proposed plan [R. 297]. They show that the appellant continuously insisted upon its full compensation. No determination was made by appellee. Mr. Dichter cabled Mr. Metcalf on July 26th that the misunderstanding would be costly, and stated that he would telephone Monday [R. 321; Ex. 41]. The 26th was a Thursday. Monday was the 29th of July, 1946. On August 2nd, Mr. Dichter returned to the United States [R. 312]. When appellant cabled him for his decision [R. 312; Ex. 34] on August 8th, he replied on August 11th [R. 313; Ex. 35] that the whole matter was in the hands of the legal department of appellee. No further communication coming from appellee, Mr. Berger went to New York on September 1st [R. 314]. He had a meeting with Mr. Heymsfeld, the counsel and secretary of appellee, on September 4th. Then for the first time, he was informed that appellee "had no further intention of going through with any arrangement or any discussion we had with Mr. Dichter during his visit, and insofar as the contract was concerned, nothing was to be done about it" [R. 314]. There were further fruitless appointments, unkept by

appellee, and conferences which resulted only in written notice from appellant to appellee that appellant would sell the glucose at the best price obtainable and look to appellee for payment of its damages. Then, in reply to the letter of appellant of date September 18, 1946, came the letter from appellee dated September 20th, which finally repudiated the contract [R. 311 and 318; Exs. 36 and 37].

2. The June Repudiation Notices Were Unaccepted Until September, Hence Wholly Ineffective.

Advice of the Woolsey notices of June 6th and 7th was received by appellant at Buenos Aires on June 7th [R. 145; Ex. 14]. June 8th it cabled appellee [R. 279; Ex. 28], opening the way for the negotiations which followed. Therein both parties contemplated the continued contract existence. The termination was not until the September letters of the 18th and 20th [R. 316-318; Exs. 36 and 37]. Thereupon appellant, for the first time, acted upon the repudiation and refusal to perform.

Basic in the rule governing the parties to a contract is that which provides that contract terms may not be altered without the consent of both. Hence, a refusal to perform or repudiation by one gives to the other the option of various procedures. In the case at bar, appellant consistently maintained the contract existence and willingness to perform thereunder until its September election to resell. In order to constitute an effective repudiation, there must be not only an unequivocable refusal to perform by one, but an acceptance by the other. Until that acceptance of the refusal, there can be no alteration of the contract terms. This general rule has had the unfaltering

acceptance of the California Courts quoting from Benjamin on Sales, Section 568.

> "It must be a distinct and unequivocal absolute refusal to perform a promise and must be treated and acted upon as such by the party to whom the promise was made, for if he afterwards continued to urge or demand compliance with the contract, it is plain that he does not understand it to be at an end."

This rule has expressly been cited and followed in the following cases:

Hanson v. Slaven, 98 Cal. 377-82, 33 Pac. 266;

Bell v. Bank of California, 153 Cal. 234-42, 94 Pac. 889;

Rauer's Law & Collection Co. v. Harrell, 32 Cal. App. 45-67, 162 Pac. 125;

Hogue-K v. Pettit, 48 Cal. App. 495-8; 192 Pac. 113;

Wilton v. Clarke, 27 Cal. 2d 1-4, 80 P. 2d 141.

In the *Rauer* case, *supra,* and the following cases, the Court emphasized the necessity that in order to have a notice of repudiation of any value or effect, it must be acted upon by the party to whom it was given. In the case at bar, neither party acted upon the notice. The cases in point are as follows:

Atchison v. Hulse, 107 Cal. App. 640-45, 290 Pac. 916;

Atkinson v. District Bond, 5 Cal. App. 2d 738-43, 43 P. 2d 867.

In this case last cited, on March 23rd the defendant notified plaintiff in writing and declared that the contract of March 16th was made void and rescinded on account of erroneous information furnished concerning the job.

The case turned upon the fact of repudiation. The Court held that this letter of March 23rd was a mere declaration of defendant not to be bound and of itself did not amount to a breach so as to effect a renunciation of the contract. It further held that no breach of the contract was made until April 18th, when the plaintiff acted upon this breach. The Court stated the rule as follows:

> "The real operation of a declaration of intention not to be bound appears to give the promisee the right of electing either to treat the declaration as *brutum fulmen* and, holding fast to the contract, to wait until the time when performance has arrived, or to act upon the declaration and treat it as a final assertion by the promissor that he is no longer bound by the contract, and as a wrongful renunciation of the contractual relation into which he has entered."
>
> *Cook v. Nordstrand,* 83 Cal. App. 2d 188-194, 188 P. 2d 282.

Here, the defendant gave an oral statement, on November 2nd, that she would not be bound by the agreement to sell the property. It appeared that the plaintiffs did not rely upon this oral statement as a repudiation or regard it as an anticipatory breach, and the plaintiffs were held to the performance of the contract.

It was not until the September interview between Messrs. Berger and Heymsfeld that refuge was taken by appellee in its June 6th notice. Even then, the door was left open for further negotiations, and it was closed only on September 18th, when appellant gave its written notice that it would sell the glucose for the account of appellee. Manifestly, the acceptance of the anticipatory breach did not, under the California law, take place until September 20, 1946. It was not until after September 20th, it will be noted, that appellant commenced to scour the world

for other purchasers for glucose. The thorough examination made of the evidence discloses no trace of any commitments made by appellant subsequent to June 6th, nor is any change in the position of appellant, at any time, to be found, nor is there any evidence of termination of the contract.

The process of perception or of reason, by which the trial court arrived at its decision determining that June 6, 1946, is the date as to which damages should be computed, has never been perceptible to appellant. Clearly, it is directly contrary to the settler's law of California.

3. The June Repudiation Notices Were Ineffective in Themselves.

The judgment and decision rest upon the June 6th telephone notice from Mr. Woolsey. Finding 6 holds that, on that date, appellee repudiated. On at least two grounds, the June notices were insufficient: (A) Mr. Woolsey admittedly had no authority to bind appellee. (B) The notices were insufficient to alter the terms of the written contract.

A. *The lack of authority of Mr. Woolsey to bind appellee is manifest.* Mr. Whipple's negotiation had all been with Messrs. Donnelly and Baglin, with whom he was in constant contact up to and on June 5th [R. 137]; on June 6th, he sent a sample of the glucose [R. 139; Ex. 11]. About 2:00 P. M., June 6th, came an unknown voice over the telephone, stating it belonged to Mr. Woolsey of the Law Department; that appellee would not fulfill their contract [R. 143, 398; Ex. 52]; that Mr. Donnelly had no authority to contract, and that the voice would transmit Mr. Whipple's request for a written statement to the proper person. June 7th came the brief wire,

likewise signed by Mr. Woolsey, but not by a responsible officer.

Election was with appellant in case of a repudiation notice to take any of the remedies provided in California Civil Code, Sections 1783 and 1784, with eventual resale under Section 1780 of the same Code. But action upon the election depended upon proving that the person giving the notice was, indeed, an agent of appellee, authorized by it to give the notice. In case of action by appellant involving disposition of the glucose and a rise in the glucose market, heavy damages would ensue unless the Woolsey authority was proven by appellant.

"I told him that I would transmit his request to the proper person" was the answer of Mr. Woolsey himself to the request for confirmation "by a responsible officer of the Schenley Corporation." This, in itself, indicated that the speaker was not "the proper person" or a "responsible officer," so the June 7th wire was no higher in authority than the message of the 6th. Mr. Woolsey testified [R. 429; Ex. 59 A] that although Assistant Secretary, he was not an executive officer of appellee; that he received his directions from Mr. Heymsfeld, Secretary of appellee, but who was not an executive officer, and the wire of June 7th was not sent upon the direction of any executive officer. As his whole conduct was solely that of counsel, he claimed the right of privilege against disclosure. Mr. Heymsfeld claimed the same privilege and stated he merely transmitted information to Mr. Woolsey [R. 784; Ex. R 2]. Appellant sought to require these witnesses to state the facts relative to these instructions, if any, and answer the interrogations placed to them. Appellee vigorously contested, on the ground that each witness was acting solely as counsel and not as executive. This position was upheld in the Court order of March 29, 1948. Ap-

pellee cannot now be heard to claim that Mr. Woolsey had any authority to bind appellee by the June notice.

Apropos of the case at bar is the case now to be cited, wherein one of the directors of the purchaser who originally negotiated the purchase contract informed the vendor for the vendee "We cannot accept Elberta peaches." He testified he was not authorized by the vendee's Board to refuse acceptance of any contracted peaches. Judgment went for the vendor, but was reversed on appeal. The case is that of *California Canning Peach Growers v. Harris,* 91 Cal. App. 654-60:

> "But in the case at bar there is no evidence that Denison, with the knowledge and acquiescence of its directors or general manager or by their direction, ever had exercised authority of the kind called in question in this case. In fact, the testimony in the case is directly to the contrary. Furthermore, there is no evidence in the record indicating that the business in question claimed to have been transacted by Denison could be deemed to be incidental to or connected 'with power to transact ordinary business.' Furthermore, there is no evidence in the record showing any ratification on the part of the corporation of the claimed conduct of the assumed agent in refusing in advance to accept defendant's peaches."

B. *The notices were ineffective to alter the terms of the written contract.* The contract is for the purchase of goods of a value in excess of $500.00 and of such nature that it must be written, signed by a duly authorized agent (Cal. Civil Code, Secs. 1624a, 1724). It can be altered only by a written contract or executive oral agreement (Cal. Civil Code, Sec. 1698). Appellee insists upon this in its answer as a special defense [R. 50]. But the June 6th notice, upon which the Findings and Judgment rest

was only oral. The June 6th notice is not mentioned in the pleadings which note that of June 7th.

The contract was established by appellant. Thereupon the burden of proof shifted to appellee to establish an alteration or termination of that contract. It relied on the June 7th notice [R. 47] for that purpose. Essential to such burden was the proof of the authority of Mr. Woolsey to sign the wire of June 7th and thereby bind appellee to its consequences. It has not sustained that burden.

The wire in itself can be construed only as an offer to alter the terms of the contract. The lack of authority of Mr. Woolsey has been noted. The effective words are "We are not entering into any agreement." The wire was never accepted by appellant and was thereby ineffective. It was not acted upon during the negotiations later noted. In fact, Mr. Metcalf, in his cable of June 12th [R. 322; Ex. 47] and talk with Mr. Whipple on June 11th, wherein he requested advice as to the extent of the uncancellable commitments, coupled with the negotiations in Buenos Aires, all affirmed the contract, recognized its existence and the rights of appellant thereunder. The acts of both parties for a full period of two months was directly contrary to any idea of lack of contract. Other particular sections of this brief, dealing with this question, demonstrate that the June notices were ineffective for any purpose. They were mere trial balloons. The Finding and decision that the contract terminated and the rights of the parties were to be determined as of June 6th has no support in the evidence nor in the law applicable thereto.

Essentially the obligation of appellee was to establish, by written evidence or executed oral agreement, an alteration of the contract. Such alteration with corporate parties may be only by duly authorized agents. Here, there was no such alteration.

> *Walker v. Harbur Bur. Blk. Co.,* 181 Cal. 773-9;
> *Ohio Elec. Cur. Co. v. Le Sage,* 182 Cal. 450-56;
> *Wright v. Beeson,* 159 Cal. 113-7;
> *Staltenberg v. Haverton,* 1 Cal. 2d 264-6;
> *Twoky v. Realty S. Co.,* 4 Cal. 2d 374-83;
> *Restatement of Contracts,* Sec. 223;
> 17 *Corpus Juris Secundum,* Sec. 374, p. 859.

C. *The sale "commitments" of appellant were prior to June 6th for the commodity purchases.* Scan the record from beginning to end; not a trace evidencing any commitment subsequent to June 6th will be found. Yet the trial court stated in its decision that appellant was "not justified in continuing to make commitments that might change its position." All purchase contracts were completed by May 24th. It is true that, at the request of appellee, tentative commitments aimed at confirming the contract and liquidating the liability of appellee were made. These contemplated sale of the subject of the contract, payment of the supplier and of appellant's profits. But after holding in abeyance a month and a half, appellee finally rejected the planned commitments. Such negotiations are favored in the eyes of the law.

> *Restatement of the Law of Contracts,* Sec. 320:
>
> "Effective of Urging Performance in Spite of Repudiation.
>
> Manifestation by the injured party of a purpose to allow or to require performance by the promisor in

spite of repudiation by him, does not nullify its effect as a breach, or prevent it from excusing performance of conditions and from discharging the duty to render a performance."

Comment:

"a. Although the effect of repudiation may be nullified as stated in Sec. 319, it operates until so unllified not only as a breach but as a continuing excuse of conditions under the rule stated in Sec. 308, and as a continuing justification of the promisee's failure to perform a return under the rule stated in Sec. 280, even though the promisee has indicated a willingness to forgive the repudiation."

Bu-Vi-Bar Pet. Corp. v. Kraw, 40 F. 2d 488, 69 A. L. R. 1295-1302:

"A continued willingness upon the part of the injured party to receive performance is an indication that if the repudiation will withdraw his repudiation, but not otherwise, the contract may proceed. It is not an 'irrevocable election not to treat the repudiation as a breach.' "

The error into which the trial court fell is thus apparent. No commitments were made. The sole construction which can be placed upon the negotiation were that appellee admitted its contract liability, sought to minimize its damages, and dealt with a view to carrying out its contract, insofar as appellant was concerned. Solely with that end in mind, did appellant deal. The original notice of Mr. Woolsey was a mere trial balloon and, until September, considered by both parties as wholly ineffective.

D. The Pendency of Negotiations for Settlement Suspended the Period for the Determination of Damages to the Date of Termination of the Negotiations.

Attack is here directed to that portion of Finding 7 which indicates that the learned trial court fell into grievous error as to both the factual and legal character of the negotiation proceedings which took place between June 6 and September 20, 1946. Without reiterating the procedures, significant facts only of the testimony are here stated. The negotiations and their termination settle five points:

a. They commenced with view of settlement of liability under the contract.

b. They proceed in July to a contemplated completion of deliveries under the contract.

c. Basis throughout was the liability of appellee under the contract.

d. Both parties contemplated deferment of delivery dates under the contract.

e. Notice of intent to resell the commodities was given pursuant to remedy therefor under the contract.

Appellant, upon receipt of news of the Woolsey messages, cabled appellee, on Saturday, June 8th [R. 279; Ex. 28] and therein stated:

> "If loss occurs must protect our interests stop *if glucose desired, please cable.*"

Tuesday, June 11th, Mr. Metcalf, far from claiming, as Mr. Woolsey erroneously did, that there was no contract and no authority in Mr. Donnelly, impliedly ratified the contract in his cable to appellant, wherein he requested advice of "uncancellable commitments" [R. 283; Ex. 29].

He telephoned Mr. Whipple, on June 11th [R. 331; Ex. 47] and

> "asked Mr. Whipple to call Engraw on the telephone at our expense *to determine what the loss would be in liquidation* of both the fifty tons ready for shipment as well as the balance of the contract . . . I told Mr. Whipple that we regretted the confusion regarding this matter and that *it was not our intention to cause either him or his principals any out-of-pocket expense.*"

The suppliers of appellant were obdurate; heavy cancellation costs were reported to appellee to ascertain the facts. Mr. Dichter was sent to Buenos Aires the 1st of July. His independent investigation unquestionably convinced him that the best method to minimize the damages which appellee must pay would be to take over the contracts which appellant had made with its suppliers and dispose of the glucose from Buenos Aires, thus avoiding the freight charge to the United States. Provided appellant's profits and its agents' commissions were cleared, this was clearly, from the correspondence, agreeable to appellant. With those ends in view, Messrs. Dichter and Berger joined in the night letter cable of July 8th [R. 288; Ex. 31] and therein stated:

> "Opening of letter of credit at once eliminate penalty to extent of $30,000.00 and would provide necessary time *for orderly liquidation over contract period which is for balance 1946* also sale over such extended period should further reduce probable loss, if any, to nominal amount therefore we suggest we act as your *agents to liquidate contracts* using our judgment as to manner of liquidation."

In a telephone talk with Mr. Metcalf later, he "stated that insofar as the program outlined in our letter of July 8th was concerned, that it seemed quite satisfactory to him." The wire of the 12th [R. 296; Ex. 32] informed Mr. Metcalf that a twenty per cent letter of credit margin would be acceptable for the liquidation program. This amounted, according to Dr. Goytia, the attorney for appellee to $85,000.00 according to his cable of July 18th [R. 610; Ex. R 1].

Mr. Dichter returned to the United States at the end of July and there the negotiations awaited the final decision of the officialdom of appellee. Meanwhile, the market was dropping so that when Mr. Berger went to New York in September, the market had determined their decision and revised appellee's views of the Woolsey communication, which they had, for three months, held in abeyance.

The contract liability was the basis of these negotiations. Those of June contemplated payment of all costs incident to the contract cancellation. Those of July definitely aimed at restoring the contract and liquidating the liability of appellee, not as the Decision states "through payment of money to plaintiff" but by selling on the market the glucose through the intervention of the $85,000.00 letter of credit. The procedure of appellant was strictly in accordance with its rights under California Civil Code, Section 1783, Subdivision 3, thence the parties in the July 8th cable arranged that the glucose on delivery would be held by appellant as bailee for appellee and sold under the joint control of both. Thereby both parties agreed to defer the June, July and August deliveries to September. This is in accordance with the California rule relating thereto.

These negotiations, it will be specifically noted, at all times from June 8th to their conclusion, were on the original basis proposed by appellant of saving it harmless and preserving its profit and expenses with cancellation of its commitments to the suppliers by means of the twenty per cent letter of credit from appellee. In this respect, *the negotiations of the parties looked at all times to the fulfillment of the contract,* insofar as appellant was concerned, by reason of the fact that appellee would take over from appellant the suppliers' contracts with their comment, and pay to appellant its profits and costs.

The fact of the matter is, as clearly shown by depositions, that in case the glucose had been thrown upon the market, it would have broken the market and no prices above 20 centavos per kilo would have been realized. Appellee could thereby have no benefit. If, in fact, appellant had taken its election to sell the merchandise on the market for the best price obtainable, the damages sought here would have been far higher than those demanded under the amended complaint.

The pendency of negotiations for settlement of the contract rights after notice of anticipatory breach of an individual contract of sale having many delivery dates, necessarily contemplates an extension of time for the acceptance of the periodic deliveries. This is a matter of common sense. There could be no settlement if the vendor was to force his rights by suit at the end of each contract delivery period. The California rule is settled that in breach of contract actions wherein the contract calls for installment deliveries, the pendency of negotiations sus-

pends the dates for determination of damages until the date of final refusal. That is, in fact, the rule which the California courts have adopted and have consistently followed.

> *Ventura R. Co. v. Roseberg Oil Co.*, 82 Cal. App. 648-54, 256 Pac. 434.

This case was for the sale of oil covering periods extending to upwards of a year. One of the issues was whether the dates of delivery or the date upon which negotiations between the parties were terminated should be taken as the critical date for the determination of the market value for damage purposes. The Court held:

> "Be that as it may, however, there can be no doubt but that negotiations were pending during the entire period, looking to the acceptance by the defendant of the oil. *It cannot be questioned under these circumstances that plaintiff assented by its acts and its statements to an extension of time within which defendant might accept*—and not until after January 17, 1922, did plaintiff terminate its negotiations. It does not rest with defendant to complain on this score, when it sought and was granted further time within which to supply shipping instructions." (Italics added.)

> *U. S. Trading Corp. v. Newmark G. Co.*, 56 Cal. App. 176-191, 205 Pac. 29.

Here the parties had agreed upon a sale of grain at various dates over a period of time. An embargo interfered with actual deliveries. The parties had differences of opinion as to their rights consequent on the embargo, and indulged in extensive correspondence involving various

notices. After the lifting of the embargo, these differences of opinion and correspondence continued. It became necessary to determine liability and fix the date for assessing damages. The Court held:

> "Because plaintiff at its election could treat the time when the embargo should be lifted as the time for completion of performance by defendant, *the damages should be measured as of the date when defendant, after the lifting of the embargo, refused to make further delivery,* which was November 12, 1919, the date adopted by the Court for that purpose. In measuring damages, the rule is that if before the time when the buyer may rightfully demand delivery, the seller gives notice of an intention not to deliver, the market price as of the date when the delivery may rightfully be demanded by the buyer will govern, and not the market price on the date of such notice or anticipatory breach." (Italics added.)

This is in harmony with the general rule of law in California that when negotiations are pending between the parties, the time for election to act is suspended until the termination of the negotiations.

> *Walker v. Harber BB,* 181 Cal. 773, 186 Pac. 356;
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> *Woodward v. Glenwood L. Co.,* 171 Cal. 513-23, 153 Pac. 951;
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> *Frankish v. Federal M. Co.,* 30 Cal. App. 2d 700-12, 87 P. 2d 90;
>
> *Curtis v. T. G. & T. Co.,* 3 Cal. 2d 612-21-22, 40 P. 2d 562.

E. The Renouncing Party May Not Require the Promisee to Sue for Breach of Contract Before the Performance Dates.

Contracts are made to be performed in accordance with their terms. After the meeting of the minds thereon one of the parties may not, by his own volition and to suit his own purposes, require the other party to omit to perform or change the terms. Ergo, he may not require the promisee to take action for non-performance before the times provided under the contract for the performance. From such common-sense view, the rule with respect to anticipatory breaches has been derived.

The notice of a repudiation has no other effect than to place the innocent party at his election of one of three courses of action. This view is required by Section 322 of Restatement of Contracts, which holds that the period of the statute of limitations runs, not from the date of the notice of anticipatory breach, but from the time fixed for the performance.

There can be no justification for findings holding that the damages in the case at bar be fixed as of the date of a repudiation notice, nor is there justification under the *Rice v. Schmid, supra,* cases for the holding that damages be determined other than at the contractual dates specified. It is to be remembered that in those cases, by the very terms of the contract, the seller was given the right to specify a contractual date for performance. The damages were fixed as of the contractual date. The District Court, in the case at bar, found in accordance with unquestioned facts in its Finding 5 [R. 66] that appellant:

> "was at all times ready, willing and able to make delivery thereof on board steamship in the Harbor of Buenos Aires, Argentina, at the delivery dates

> set forth and prescribed in said shipping schedules, heretofore found, of all the said glucose so to be delivered; that it is further true that said plaintiff duly performed each and all of the conditions and provisions under said contract to be performed upon its part."

There, therefore, is no element here of a change of condition such as to render performance impossible. As above noted, there were no commitments by appellant, and there was no change in its position. The Court has so found, in Finding 5 [R. 66]. There was no abatement at any time of the demand for full performance or in lieu thereof the measure of damage which the law would award. The decision of the District Court is, in this respect, directly contrary to the rule of the text writers and of the courts which have given consideration to this subject. The decision attempted to make a new contract for the parties, accelerates the date of performance, and nullifies the whole program for performance which appellant was required to keep and maintain. This is not permissible under the rules of law applicable to the situation.

Restatement of the Law of Contracts, Section 320:

> "Manifestation by the injured party of a purpose to allow or require performance by the promisor in spite of the repudiation by him, did not nullify its effect as a breach, or prevent it from excusing performance of conditions or from discharging the duty to render a return performance."

17 *Corpus Juris Secundum,* Section 472, page 978:

> "The renouncing party may not force the other, nor is the other bound, to sue for a breach of the contract before the date fixed for performance ar-

rives, and have the damages assessed as of the time of a renunciation. The party keeping the contract, in other words, need not mitigate the damages by treating as final the premature repudiation."

Williston on Contracts, Sections 1334-1337;

Alderson v. Houston, 154 Cal. 1-14, 96 Pac. 884;

Muehlstrom v. Hickman, 20 F. 2d 40, 58 A. L. R. 1294-1301.

"The seller is not compelled to avail himself of an anticipatory breach, but may wait until the full period of performance has expired."

Bu-Vi-Bar Pet. Corp. v. Krow, 40 F. 2d 488, 69 A. L. R. 1295-1302.

"A continued willingness upon the part of the injured party to receive performance is an indication that if the repudiator will withdraw his repudation, but not otherwise, the contract may proceed. It is not an irrevocable election not to treat the repudation as a breach. The refusal to retract amounts to a continuation of such rescission."

U. S. Trading v. Newmark G. Co., 56 Cal. App. 176-91, 205 Pac. 29.

In this case the parties contracted for the purchase and delivery of barley over a period of time. During the period of the deliveries, the seller as of October 7, 1919, refused to perform, and claimed that damages should be determined as of that date, but the Court held that November 2, 1919, which was the date upon which the buyer could demand delivery, must be the date for determination of damage, stating:

"In measuring damages, the rule is that if before the time when the buyer may rightfully demand delivery, the seller gives notice of an intention not to deliver, the market price as of the date when the delivery may rightfully be demanded by the buyer will govern, and not the market price on the date of such notice for anticipatory breach."

Ventura R. Co. v. Roseberg Oil Corp., 82 Cal. App. 648, 256 Pac. 434.

Plaintiff sold oil to defendant at the rate of five cars per month for a year. Ten cars were delivered, but consequent upon a fall in the market price, defendant failed to give shipping instructions. The defendant contended that damages should be fixed as of the date of the breach in failing to give instructions. Negotiations had ensued upon this breach, looking to the acceptance by the defendant of the oil, but they came to nothing. The Court held that the date of determination of the negotiations was the date of the fixation of damages, as the contractual delivery dates had all passed.

During the negotiations, appellant actively throughout the continuance thereof and in good faith, afforded every opportunity to appellee to minimize the damages resultant upon its notice of intent to repudiate. The plan was adopted after the investigation by Mr. Dichter of the market conditions. Under this plan, the glucose was to be sold during the contract period under the control of Messrs. Dichter, Goytia and Berger. This was the only feasible method to adopt, in that under the contracts with the suppliers, deliveries were to be made at different times during the contract period. In case appellant had refused to co-operate with appellee, it might well have been criti-

cized. Certainly criticism cannot be made, inasmuch as it did accede to this plan.

There was neither pleading nor proof on the part of appellee as to any lack or failure on the part of appellant in its conduct in respect to its duty to minimize the damages. Yet it is generally held to be the duty of the defendant to plead and sustain the burden of proof on this affirmative issue.

> *Vitagraph Inc. v. Liberty T. Co.,* 197 Cal. 694-9, 242 Pac. 709;
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> *Alderson v. Mutual,* 154 Cal. 1-10;
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> *Anderson v. La Rinconado C. Club.,* 4 Cal. App. 197-201, 40 P. 2d 571;
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> *Oakland v. P. G. & E. Co.,* 47 Cal. App. 2d 444, 118 P. 2d 328;
>
> *Dutra v. Cabral,* 80 Cal. App. 2d 114-121, 181 P. 2d 26;
>
> *Stillwell v. RCA Mfg. Co.,* 62 Cal. App. 2d 347-52, 144 P. 2d 638;
>
> 25 *Corpus Juris Secundum,* Sec. 114, p. 791.

Even in cases of rescission in dealing with the defense of laches, the California courts have adopted the firm rule that where negotiations are in progress between parties, there is no obligation upon the wronged party to take action until the conclusion of negotiations.

> *Curtis v. T. G. & T. Co.,* 3 Cal. 2d 612-22, 40 P. 2d 562.

> "Where the vendor by promises or representations to the vendee causes the vendee to postpone efforts to rescind the contract, the vendor cannot urge the failure of the vendee to rescind within the time during

which the vendor's fears of fraud have been lulled by such repudiations."

Frankish v. Fed. Mtge. Co., 30 Cal. App. 2d 700-12, 87 P. 2d 90;

Woodard v. Glenwood L. Co., 171 Cal. 513-22, 153 Pac. 951;

Reniger v. Hassel, 216 Cal. 209-11.

There is here no question but that this is an action at law and that the doctrine of laches accordingly does not apply, but no attempt has heretofore been made to claim that the act of carrying on negotiations with the repudiating purchaser would operate to affect the rights of the vendee when the vendee had studiously at all times insisted upon its contract rights to recover damages for the breach.

F. The Last Day of the Month Is the Delivery Date in All Contracts Requiring Delivery During a Month.

The deliveries for June were not required to be made until the 30th day of June, rather than on the 6th, but the market, on news of the repudiation, had broken before June 30th to about 60 centavos [R. 494, 505, 516; Ex. 60 A-B-C].

55 *Corpus Juris*, Section 329, page 339:

"So a contract for delivery in certain months permits delivery at any time during any of the months named, and a contract for delivery 'commencing April, May' does not require delivery to commence until the end of May. On the same principle, if the agreement is that delivery shall be made within a designated month, the seller ordinarily has until the last day of the month to make delivery, and a delivery by carrier at the usual place on that day is good, although the buyer did not actually receive the goods until the next day."

The delivery date to be taken under this contract, in each instance, is the last day of the month named. Thus, the June contract day would be June 30th; the August-September delivery of 200 tons would be the last day of September contemporaneous with the September delivery of 150 tons. The judgment, in this respect, is cited as violating the contract terms made by the parties.

> "I am not an executive officer of Schenley Distillers Corporation and I did not send this telegram upon the direction of any executive officer." (Woolsey deposition.) [R. 429-435.] "Opening of letter of credit will provide necessary time for orderly liquidation over the contract period which is for balance 1946." (Dichter wire to Metcalf.) [R. 288; Ex. 31.] "Engraw appears willing to cancel. It is asking 2¢ per pound to cover loss." (Metcalf notation.) [R. 325; Ex. 40.]

The foregoing are, indeed, isolated statements culled from the record. Respectively, in their context setting, they disprove repudiation prior to September and prove that the June notices were unauthorized. The negotiations first contemplated damages for cancellation of the contract, then liquidation, over the contract period, at appellee's sole cost. This implicitly involved extension of the delivery periods until conclusion of the negotiations. The trial court finding is thereby contrary to the sole evidence as to the term of the negotiations; contrary to the California rule governing the right of the seller to elect his remedies and to that controlling, in cases of notices of intent to repudiate. The Findings and Conclusions of Law set forth in Findings 6, 7 and 8 and Conclusions Two and Three are thereby erroneous.

II.

Market Values Throughout the Contract Delivery Period Warrant Relief as Prayed.

The District Court made two errors of fact; one, in its finding of market values, and the other, in its omission to find on market values. Omission to find the market values on the five delivery dates other than June and September were caused by its error in finding the date for the fixation of damages as June 6th; but this being true, why it went out of its way to find the September market value, is difficult to see [Finding 8, R. 66]. On the other hand, it found that [Finding 10, R. 67] market values were well established and that the proof thereof was clear, certain and uncontradicted. These findings are clearly contradictory, not only with themselves, but with the "clear, certain and uncontradicted evidence" of the market values.

A. Only One Market.

The determination that there were two markets in Buenos Aires, one for domestic sales, the other for export sales, with no fixed relationship, one to the other, was a truly egregious error. The very finding itself illuminated the error, wherein it gives that which it terms two market prices, the one for June, the other for September, and states that between the export price and the market price, in each instance, there is a difference of 15 centavos.

This is not a mere hypercritical caviling at the wording of the finding. The whole evidence in the case was conclusive that there was but one market for glucose in bulk or returnable iron containers, and that it cost, throughout the delivery period of the contract, 15 centavos per kilogram to transfer the glucose from domestic market

and place it on board ship. This was a continuing, fixed and constant charge. It involved the elements of purchasing kegs, packing the glucose in kegs, cooperage, transportation, stevedoring, and the financing of incidental cost. There was no evidence to the contrary. Answers to the 10th and 11th interrogatories [R. 462] are given by the witnesses [R. 495, 506, 516, 537; Ex. 60 A-B-C-E]. In case this finding should be allowed to stand, then there is no evidence to sustain any market price; however, the finding is directly contrary to the sole evidence in the case.

It is true that Mr. Berger, president of the appellant, on cross-examination, did testify [R. 356], that the domestic bulk market was not the same as the export market, and that there was a difference between them. He testified, however [R. 351], that he was not qualified to answer any questions as to these differences. The fact of the matter is, reviewing his testimony between the cited pages, that he was speaking of prices on the domestic market and prices for glucose delivered under f.a.s. contract. All of appellant's glucose purchases were made at prices including deliveries free at ship's side [R. 241-4; Exs. 21 to 21G]. Inasmuch as Mr. Berger made all of his purchases from brokers, he doubtless, in testifying, had in mind the f.a.s. prices paid on the contracts in evidence to the brokers rather than the prices which at the date of purchase, prevailed on the Buenos Aires market. There is no basis in the evidence that there were two markets. However, it is to be noted that Mr. Berger was not offered as an expert, did not testify as an expert, nor had he any qualifications as an expert. Undoubtedly, it was proper cross-examination, but there was no basis upon which to ground a finding against the clear evidence of fact.

The sole market value testimony produced in the deposition is thoroughly reasonable. No one inquires in an open public market as to whether the buyer is Mr. Jones of California, or Sr. Sanchez of Buenos Aires. Either one, in case he has the money to pay, is a satisfactory bidder. Essentially, this important finding has no basis in the evidence, and, in fact, is directly contrary thereto.

B. The Market Price During the Contract Delivery Dates.

The District Court failed to find upon all but two of the market prices prevailing for the several delivery dates. It also failed to find the market value at the date of the disposition of the glucose. Evidence uncontradicted was given by the seven expert witnesses on the market price at each of the delivery dates. For the convenience of the Court, this evidence is given in answer to the 9th interrogatory [R. 461] by the witnesses.

ie	Tr. No.	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	April
eim	R. 494	1.15–1.25	1.15–1.26	60	60	60	60	60	60
	R. 505		55–57	55–57	55–57	55–57	55–57	55–57	55-57
es	R. 516	1.20	60	60	60	60	60	60	60
i	R. 527	1.20–1.23 f.a.s.	None	20–60	20–60	20–60	20–60	20–60	20–60
	R. 536	1.15–1.22	1.15–1.22	No operations	No operations	61–62	61	60–61	52–53
	R. 541	1.13–1.20	1.13–1.20	No operations		61–62	61	60–61	52–53

These prices were all in the domestic market for bulk glucose or returnable containers; except it is to be noted that the Polastri deposition [R. 526; Ex. 60D] gives an f.a.s. price. This price involved a charge of 10 centavos for delivery in casks and transportation to the wharf side [R. 551; Ex. 60G]. It is, of course, a case for judicial determination as to the exact price to be taken for each

month. Appellant, in calculations for its pleadings, took the price of 60 centavos in September for all deliveries due to that date. This follows under the rule above developed, that by reason of the continuance of discussions, the negotiations, the withholding of final determination of repudiation, and the September action thereon, the September 20th date should be taken rather than the June 6th date. The price of 60 centavos for deliveries subsequent to September is taken in the calculations under the first cause of action. As calculations for the second cause of action, under the theory of pricing at the date of ultimate disposal, a market price of 57 centavos has been taken. To each of these market prices must be added, in order to determine the damage, the cost of 15 centavos per kilogram between the market value and the value on board ship.

The glucose in the case at bar was purchased in May under f.a.s. contracts at the price of 1.20 pesos [R. 244; Exs. 21 A to G]. This means that the market price for the purchase in May on the Buenos Aires market was 1.10 pesos or was 10 centavos less than the contract cost to appellant; indicating a May market price of 1.10 pesos. The evidence shows, as noted in the résumé above, that the market price in June had a range of from 1.13 to 1.20. The District Court took the highest price when, in its opinion, it held the market price in June to be 1.20 pesos, and in its findings added 15 centavos thereto to make the critical figure of 1.35 pesos. Be that as it may, there is actual evidence to sustain the finding of 1.20.

There is no evidence, however, to sustain the finding that the market price in September was 1.10 pesos. The sole evidence shows that it was 55-60 centavos in September. It is true that Mr. Berger testified [R. 353-4] that

in August there was a nominal market made up of only asked quotations of from 1.23 to 1.25. The Court has probably taken this figure and deducted 15 centavos therefrom to arrive at the figure in the findings of 1.10 pesos.

It was, likewise, reported by Mr. Heymsfeld in his deposition that Mr. Berger had told him, in a consultation held on September 4th, that the market was between 1.08 and 1.10. Now, Mr. Berger left Argentina on the 24th of August [R. 314]. The interview was September 4th [R. 314]. If the same deduction of 15 centavos is to be applied to this figure, then it shows an actual market price of 93-95 centavos. But that would be for August, not September. In short, Mr. Berger clarified the situation, when testifying that the August quotations which he theretofore had given were [R. 380] asked prices from the supplier's standpoint. The suppliers' prices of the glucose at bar were f.a.s. sales and not market sales [R. 244; Exs. 21 A to G].

The depositions of the expert witnesses on market values show that, consequent upon the news of the repudiation by appellee, according to two of the witnesses, actual sales were all domestic, at a price of 60 centavos per kilo [R. 494, 505; Exs. 60 A and B], during July, August and September, although others held at a little higher price. The speculative owners of glucose naturally held to the June prices and were adverse to taking the great drop to 60 centavos; while the buyers refused to buy, except at the actual market prices which were established by glucose manufactures to consumers. It is to be kept in mind that the May market was at the height

of a speculative trend. The price from the two manufacturers remained fairly constant throughout the year 1946 at 60 centavos [R. 526; Ex. 60 D]. The market had steadily risen from 78 centavos per kilogram, in January, 1946, up to 1.05 pesos in April [R. 555; Ex. 60 G]; and during May, advanced from 1.10 to 1.20 [R. 237]. During May, it fluctuated quite rapidly. The cause of this rise and fluctuation was that glucose was in the hands of speculative middlemen [R. 556; Ex. G]. Thereby, the rise in price and fluctuation was caused; it was especially violent, in that the brokers and dealers in glucose were only about 20 in number [R. 556]. In September of 1946, competitors in the United States were "offering at prices lower than the *Argentine producers were asking*" [R. 556]. So the speculative market which had preceded was suddenly resolved to the true 60¢ values. But the knowledge of the vast program of UNRRA in Europe [R. 527; Ex. 60 D] further tended to the bursting of the speculative bubble. In fact, it was the opinion of the broker Polastri that "prices during the period of July, 1946 to May, 1947, went down to such an extent that, in order to make a sale, it was necessary to have the vendue in which only a price of about 20 centavos Argentine currency could be obtained." [R. 526; Ex. 60 D.]

Under the clear testimony in the case, the actual determination of the market value of glucose during the seven delivery dates is eminently one for the court's judgment. There is a very small and a very natural difference between the testimony of these various witnesses. They all tend, however to the reasonable middle ground taken by appellant in its calculations of 60 centavos per kilogram for each of the delivery dates and 57 centavos per kilogram for the April delivery.

III.

The Contract Rate of Exchange Upon Which the Parties Agreed Must Govern the Court in Its Computation of Damages for Breach of the Contract.

The contract specifies [R. 116 and 124; Exs. 3 and 5], *that the export rate which shall govern parties in their computations is $100.00 to 335.82 Argentine pesos, or $0.29778 to the peso.* This rate spelled out for the determination of the amount per pound $0.18573 and with other details, enters into the estimated landed cost of $0.22293 per pound. Mr. Donnelly, in his confirmatory letter to his superior, Mr. Kiefer [R. 409, Ex. 58], itemized the detail of price including this exchange rate and states as an inducement that the rate of exchange as stated was:

> "A pegged rate for export, and is therefore not subject to fluctuation. This means that the only variation in price that can occur will be in the freight rate, where there may be a slight difference. However, in no case, will the price be higher than $.2203 per pound,"

and advises that he has accepted the proposal, on this basis.

Foreign exchange, especially since 1914, has been the cause of great difficulties in commercial transactions. Certainty in the amount payable and receivable is of prime importance to a trader in foreign commerce. Only by reason of such certainty can he, with like certainty, determine his manufacturing cost and selling price. The settlement of this uncertainty of foreign exchange by contract tends to stabilization of trade. When the parties to a contract for their own purposes have, by their solemn

agreement, settled upon any particular rate of exchange at which they will deal, that rate of exchange necessarily is one of the integral agreements between the parties and must be observed as such, even as any other term going to make up the price. It matters not whether the rate of exchange adopted by the parties is an open rate, a market rate, a par rate, a rate as of any specific time, or some governmental rate. It is, above all, *the contract rate* which the parties have agreed upon and which the parties themselves intend shall govern their relations in respect to the particular contract, irrespective of any other views.

A. The Contract Rate of Exchange Governs the Damages.

It is the settled legal principle that courts will enforce the terms of a contract in accordance with the agreement of the parties. The courts do not sit to make new contracts or vary the contractual terms. In accordance therewith, the courts have enforced in their judgments the rates of exchange as agreed upon by the parties and which are a part of the contract.

> *Pennsylvania R. Co. v. Cameron* (Pa.), 124 Atl. 638; 38 A. L. R. 1281.

A shipment of wool from Australia was delivered at a West Coast port. Thence, it traveled by rail to Philadelphia. It had stamped upon the bill of lading "Freight, if payable at destination, to be at the rate of $4.866 exchange." Appellants tendered payment to the Railroad Company in pounds sterling and refused to pay in dollars at the specified rate of exchange for the freight charges. The Court held to the contract rate and stated:

> "Where the rate is established by contract or otherwise, it is a fixed rate and controls all matters brought

within the scope of its operation. What is stamped on the bill expressly excluded current rate exchange."

Marine Ins. v. McLanahan, 290 Fed. 685.

The marine insurance policy provided that all claims were to be settled at the rate of $4.75 to the pound. It was held that this fixed the rate of exchange so that all losses thereunder were payable at the contract rate.

Forbes v. Murray, Fed. Cas. No. 4928.

There was in the bill of lading a provision for the payment of freight at a specified number of pounds. The Court held that recovery should be made at the equivalent thereof in American currency.

Barth & Co. v. Canadian Government, 63 F. 2d 241:

"But the contract of the parties went further and provided how the 'equivalent' should be calculated, namely, 'on current rate at date of steamer's arrival at loading Port.' This rate was $4.85, it fixes the number of dollars to be paid, if payment is made in dollars. It does not, however, negative the existence of an option; the contract is to pay in the alternative 'sterling or equivalent,' the latter to be determined at the stipulated rate. Had the parties intended to require payment in dollars only, the means were at hand; they had merely to fill in the marginal provision above quoted. Had this been done, the duty to pay in dollars at the fixed rate would have no alternative."

B. The Rate of Exchange Prevailing at the Date of Breach in the Absence of a Contractual Rate Governs the Damages.

The great majority of the cases dealing with the rate of exchange have been upon documents which have not specified the rate between the two countries. Varying circumstances of the cases have led courts to adopt different rules in their determination as to the time at which the rate of exchange should be adopted. In such cases, where the rate is not contractual, it now appears that the weight of authority of other jurisdictions has become harmonized, in accordance with the English and New York rule.

The rule determining that the rate of exchange is that prevailing at the date of the breach, is simple, logical and just. No better argument for the rule can be made than that given by the learned judges of the Court of King's Bench in the case of *DiFernando v. S. Smith & Co.,* 89 L. J. K. B. N. S. 1039; 11 A. L. R. 358-60:

> "The plaintiff is entitled to have his damages assessed as at the date of the breach, and the court has no jurisdiction to award damages except in English money. I think that if that rule is kept clearly before one's mind, a great deal of the difficulty which counsel for the appellants suggested disappears. The plaintiff is entitled to his damages as at the date of the breach, and it seems to me the judge must express those damages and no other damages in English money, and in order to do that, he must take the rate of exchange prevailing at the date of the breach."

Richard v. American Union Bank, 241 N. Y. 17; 149 N. E. 338; 43 A. L. R. 512.

"The well established rule is that a breach of an executory contract is to be allocated to the place where the contract is to be performed, and in accordance with this rule the breach of contract occurred in Bucharest."

"Another rule is that damages for such a breach are to be measured by the standards of value which prevail where the breach occurs, which in this case would be a Bucharest where lei were the national currency at a standard of value. Nothing else was decided in this, *Hoppe v. Rousso Asiatic Bank,* 235 N. Y. 37; 138 N. E. 497, where it was simply held that when a plaintiff was entitled to recover damages for breach of contract which would be primarily expressed in money of the country where the breach occurred, the rate of exchange prevailing at the date of the breach would be adopted as the one by which to convert the foreign money into our domestic money and fix the amount of the judgment in dollars."

Parker v. Hoppe, 257 N. Y. 333, 178 N. E. 550, 80 A. L. R. 1359-1362;

Gross v. Mendel, 225 N. Y. 633, 121 N. E. 871;

Kantor v. Aristo Hosiery, 248 N. Y. 630, 162 N. E. 553;

Sokoloff v. National City Bank, 250 N. Y. 690-1-2, 164 N. E. 745-9-50.

The Federal courts in exclusively Federal law cases, such as admiralty and patents, have tended to follow the rule of assessing damages as of the date of trial or judgment. But in the diversity of citizenship cases they have held to the New York rule.

The West Arrow, 10 Fed. Supp. 385-93.

It was held that the place and time of sale and not that of stranding fixed the accrual of libelant's cause of action. And in

Bank of California v. International, 40 F. 2d 78,

it was held that the rate of exchange must be determined as of the date of the breach and not as of the date of judgment. This case was later reversed in 64 F. 2d 97, but the later opinion did not deal with the point at issue here.

Dante v. Miniggio, 298 Fed. 845, 33 A. L. R. 1278, *syllabus,* A. L. R.:

"In an action in this country for the contract price of merchandise purchased in France and payable in francs, the recovery must be for dollars at the rate of exchange prevailing when the debt fell due, and not when the judgment is entered."

The California Supreme Court has endorsed the English and the New York rule in apparently the only case which has come before it, that of *Grunwald v. Freese,* 4 Cal. Unrep. 182, 34 Pac. 73-76. The parties here were merchants, the plaintiffs located in Japan and the defendants in San Francisco. The action was upon a balance due upon an open and current account. For convenience, all dealings had been quoted in Mexican dollars rather than in the currency of either Japan or the United States. Demand upon the account was made August 3, 1890. At that time, the Mexican dollar was 93½ cents. Subsequently the exchange declined. The rate to be taken in

determining the judgment was important. The opinion was written by Commissioner Searls, affirmed by the Commission and the Court. It was there stated:

> "Apply the principle thus enunciated to this case, and we may say had defendant made his contract when it was due, that is to say, when demand was made upon him, plaintiffs would have had $4,999.67 Mexican dollars of the value of 93½ cents each, or their equivalent in our currency; a sum in excess of that which the court awarded them. If a man contracts to deliver wheat on a given day, and fails to do so, the measure of damages is the market price of the article on that day, and in principle it is difficult to see why the rule should not hold good when he agrees to deliver Mexican dollars or other foreign money, which, in the absence of some positive law of our own, is but a commodity. There are authorities which hold that the rate of exchange at the date of the trial is the criterion by which to determine the amount of the judgment, but in most instances the only question evidently relates to the mere expense of effecting the exchange, or in other words, the cost of transmitting the funds, for that is what it amounts to, cases in which, so far as appears, the question of depreciation or appreciation of the currency in which the debt was payable cut no figure. In *Benners v. Clemens, supra,* (58 Pa. St. 24), cited by appellant, the recovery was had upon the basis of the value of legal tenders at the date of the presentation of the account."

This case was cited with approval in

281 Fed. 557, 7 F. 2d 334.

The same principle was approved in a case wherein a German firm was indebted to an American firm prior to the First World War. The Alien Property Custodian Hicks took over the property of the German firm. The American firm brought action to recover on an account stated. Justice Holmes delivered the opinion of the Court.

Hicks v. Guinness, 269 U. S. 71, 70 L. Ed. 168-171:

"We are of opinion that the courts below were right in holding that the plaintiffs were entitled to recover the value in dollars that the mark had when the account was stated. When the contract was broken by a failure to pay, the American firm had a claim here, not for the debt, but at its option for damages in dollars. It no longer could be compelled to accept marks. It had a right to say to the debtors, 'You are too late to perform what you have promised, and we want the dollars to which we have a right by the law here in force.' *Gould v. Banks,* 8 Wend. 562-568, 24 An. Dec. 90. 'The event has come to pass upon which your liability becomes absolute, as fixed by law.' *Globe Ref. v. Lenda Cotton Oil Co.,* 190 U. S. 540-43, 47 L. Ed. 1171-73, 23 Sup. Ct. Rep. 754. There is no doubt that this rule prevails in actions for a tort. *Preston v. Prather,* 137 U. S. 604, 34 L. Ed. 788, 11 Ct. Rep. 162, 1 An. Neg. Cas. 559, and in actions for the failure to deliver merchandise. *Hopkins v. Lee,* 6 Wheat. 109, 5 L. Ed. 218. The principle is the same in a contract for the payment of marks. The loss for which the plaintiff is entitled to be indemnified is but the loss of what the contractee would have had if the contract had been performed. *Chicago N. & St. P. R. Co. v. McCaull-Dinsmore Co.,* 23 U. S. 97-100, 64 L. Ed. 801-3, 40

> Sup. Ct. Rep. 504. It happens at the moment when the contract is broken, just as it does when a tort is committed, and the plaintiff's claim is for the amount of that loss valued in money at that time."

The rule is summed up in

> 25 *Corpus Juris Secundum,* Section 194, page 909:
>
> "Where plaintiff in a tort or contract action primarily is entitled to recover a sum expressed in foreign money, in determining the amount of recovery in terms of United States money, it is admittedly proper to take the rate of exchange prevailing at the time of the commission of the tort or breach of contract, and in the case of a debt, the rate prevailing when the debt became due should be adopted."

The courts have varied in their rules between actions in tort and actions for breach of contract and as to deliveries in foreign countries or of domestic deliveries of foreign goods, and have under varying circumstances assessed the damages: (a) At the date of the breach; (b) at the date of the commencement of the contract; (c) at the par of exchange; (d) at the date of the commencement of the suit; (e) at the date of trial; (f) at the date of judgment. The truth of the matter is that American courts in the last century were not greatly concerned with these rates of exchange and have been swayed by various reasons. But as noted above, the great State of New York has definitely settled the rule that in all cases of judgment for breach of contract, the rate of exchange prevailing at the time of the breach must be taken to find the amount of the judgment to be rendered in dollars. This is in true accord with the long settled English rule. California is in agreement therewith.

IV.

Procedural Errors.

Errors in Computation.

The more serious errors which have heretofore been reviewed, upon correction will overcome the very minor errors made by the Court in its computations. These errors needs must be noted. Finding 8 [R. 67] correctly states the contractual purchase price as:

Argentine pesos	1,560,625
The finding finds the June 6th market value as	1,532,215
The correct difference between these sums is	28,410
But the Court erroneously finds the difference as	28,375
An error against appellant of Argentine pesos	35
This error, at the rate which the Court takes of $.206, amounts to the sum of	$7.21

The true damage judgment under the findings, therefore, should have been $5,852.46. This would likewise alter the interest in a small amount.

Errors in Ruling on Motions to Amend Findings and Judgment.

Motions to amend the findings and judgment respectively in the particulars noted in the specification of errors were filed in due time [R. 72 to R. 77]. They came on for hearing and were denied by the Court [R. 78]. The specifications in regard to the errors of the evidence were, therefore, brought before the trial court, and every effort was therein made to correct these factual and legal errors. The date within which the appeal was required to be filed is thereby established.

V.

Conclusion.

Resolves definitely are the questions presented by application of the law of sales to the proven and uncontradicted evidence in this case. The buyer who wrongfully refuses to accept and pay, is liable to the seller for damage for the difference between the contract price at the time or times when under the terms of the contract the goods ought to have been accepted. A notice of intention to repudiate or a repudiation notice itself, as long as it is not accepted by the seller, is of no effect to alter the rule regulating the assessment of damage. Negotiations entered into between the parties to liquidate the liability of the renouncing buyer necessarily entail a deferment of the time or times when the goods ought to have been accepted to the termination date of the negotiations. The rate of exchange for foreign moneys agreed upon in the contract by the parties is controlling, and the Court may not make a new term to the contract.

The resolution of these basic questions requires the reformation of the findings and judgment. The proven facts are clear that there was only one market in Buenos Aires for glucose during the contract delivery period. The market prices therein were less than those as alleged by the appellant. The averments of the amended complaint of the appellant were fully and clearly substantiated as to the market prices so prevailing.

Therefore, appellant was and is entitled to judgment, as prayed, on its first cause of action.

Respectfully submitted,

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